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SUPREME COURT OF THE UNITED STATES

October Term, 1948

STATE OF OKLAHOMA, EX REL. CHARLES NESBITT, Commissioner of Conservation,

Complainant,

vs.

UNITED STATES OF AMERICA,

Petition for Writ of Certiorari, and Brief in Support Thereof

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SUPREME COURT OF THE UNITED STATES.

October Term, 1946.

No. .....

STATE OF OKLAHOMA AND CHAMPLIN REFINING COMPANY, *Petitioners,*

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioners respectfully show:

Summary Statement of Issues Involved.

This case is between the State of Oklahoma and private claimants to determine whether the bed of the Arkansas river at the location in controversy, shall belong to the whole people of the state, or whether it shall be divided among the various private owners of the lands along the shore. In a larger sense, the case involves the right of the State of Oklahoma and all other states similarly situated, to exercise the same sovereignty and control over the beds

of their rivers generally, as is enjoyed by the older states of the Union.

The State of Oklahoma claims title to the portion of the Arkansas river bed here in question by virtue of a decision of the Supreme Court of Oklahoma rendered in 1914, seven years after statehood, in the case of *State* v. *Nolegs*[1] in which the state court took judicial notice of the fact that the Arkansas river is navigable throughout the state, and that the bed of the river belongs to the State of Oklahoma.[2] It is not pretended that this river is navigable under the Federal test of actual navigability.[3] However, this Court in *Wear* v. *Kansas*, 245 U. S. 154, as affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, has expressly approved the general practice of the states of reserving control over the beds of their rivers by declaring them to be navigable, although in the language of the court, "they are not actually so."[4] Hence, it is entirely immaterial for the purposes of this case whether or not the Arkansas river is actually navigable at the location in controversy. The only real issue in this action is whether the state determination of navigability is the governing law of the case.

The state, in pursuance of its claim of title, has sold and delivered an oil and gas lease upon the portion of the river bed here in controversy to the Champlin Refining Company, reserving the usual royalty in favor of the state.[5] The state's lessee had drilled two producing oil wells upon the lease,[6] which lease is now estimated by the state to have a value of $500,000.00.

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1. 40 Okl. 479.
2. This decision was re-enforced by a state statute, enacted in 1919 (Title 64, Okla. Stats. 1941, Sec. 290), covering, generally, all streams of two chains or over in width.
3. The Arkansas river is actually navigable below its confluence with the Grand river in eastern Oklahoma, but such portion of the river is not involved in the present case.
4. Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77.
5. Exhibit "B" to Complaint, Record, page 20; admitted by answers, Record, pp. 23, 27, 28.
6. Record, p. 70: At the time of the trial only one well had been completed on the lease.

The title of the state is here being disputed by certain Otoe and Pawnee Indians who, prior to Oklahoma statehood, received Federal patents covering lands along the shore, adjacent to the above described river bed lease. These patentees claim that the common law, as adopted by the Territory of Oklahoma, had the effect of extending their patents to the center of the stream at the time the patents were issued.

The present action was brought by the United States on behalf of the Indians above described, to quiet their alleged title, to eject the State of Oklahoma from possession of the river bed and to cancel the above described lease. Two important features of the plaintiffs' action are, (1) the United States is not asserting title to the river bed in its sovereign capacity, having elected on the contrary to claim title for the Indian riparian owners as above stated,[7] and (2) the United States does not contend that it *expressly* conveyed the river bed to the riparian lot owners, for as the government concedes, the patents which are involved in this case do not expressly convey any portion of the river bed.[8]

The State of Oklahoma defends its title against the contentions of the riparian owners upon the following principles:

(*1*) The portion of the river bed here in controversy was part of the public domain at the time Oklahoma was admitted as a state and was never granted to the riparian owners by the United States.[9] Although the river bed had been granted by the United States to the Cherokee nation in 1828,[10] (at a time when it was not contemplated that a

7. Complaint, Record, pp. 11-13; Stipulation, Record, p. 38; Conclusions of Law, Record, p. 72.

8. Findings of Fact V, Record, p. 69.

9. Title 43, U. S. C. 931, might appear on its face to dispose of beds of non-navigable rivers, but this statute does not cover the public lands involved in this case. It is shown in the historical note following this section in U. S. C. A. to have been derived from the Act of May 18, 1796 (1 Stat. 468), and the Act of May 3, 1803 (2 Stat. 235). The first statute applied only to the territory northwest of the Ohio river, and the second statute applied only to the old Mississippi territory south of the State of Tennessee and east of the Mississippi river.

state would ever be formed in the Indian country),[11] this portion of the bed was later, in 1891, ceded back to the United States by the Cherokees with other lands[12] and in 1893 was declared by the President of the United States to be a part of the public domain, in the proclamation in which he opened for settlement the lands in northern Oklahoma commonly known as the Cherokee Outlet or Cherokee Strip.[13]

Thereafter, the United States issued the allotment patents covering lands along the south bank of the Arkansas river which are involved in the present action.[14] These patents as above stated, did not convey any portion of the river bed and did not define the riparian rights incident thereto. These patents were issued prior to November 16, 1907, on which date Oklahoma was admitted to statehood.

(*2*) This Court has held, by a long line of decisions, that where a Federal grant does not define the riparian rights which shall attach as an incident to the grant, such rights shall be determined by state law,[15] and that the same rule applies to Federal grants to members of Indian tribes.[16] Since the patents in the case at bar did not expressly cover

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10. 7 Stat. 311.

11. See treaty between United States and Cherokees, 1828, 7 Stat. 311.

12. Kappler Indian Affairs, Law and Treaties, Vol. 1, p. 490, Def. Ex. 12, Record, p. 159; introduced, Record, pp. 98, 109.

13. 28 Statutes at Large 1222. The history of the title will be set forth in detail in the attached brief. The government contended, in the courts below that the Cherokees conveyed the portion of the river bed here in controversy to the Otoe Tribe and hence, that it was not a part of the public domain. However, neither the United States District Court nor the United States Circuit Court of Appeals sustained the government on this point, and it does not appear to be one of the main issues in the case.

14. Record, pp. 114-119.

15. Barney v. Keokuk, 94 U. S. 324; St. Louis v. Myers, 113 U. S. 566; Packer v. Bird, 137 U. S. 661, 673; Hardin v. Jordan, 140 U. S. 371; Kaukauna Water Power Co. v. Green Bay and Mississippi Canal Co., 142 U. S. 254; St. Anthony Falls Water Power Plant v. Board of Water Commissioners, 168 U. S. 349; Hardin v. Shedd, 190 U. S. 508; Wear v. Kansas, 245 U. S. 154; Oklahoma v. Texas, 258 U. S. 574; Brewer-Elliott Oil and Gas Co. v. United States, 260 U. S. 77; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206.

16. Oklahoma v. Texas, 258 U. S. 574; United States v. Oklahoma Gas & Electric Co., 318 U. S. 206; In re Heff, 197 U. S. 488; General Allotment Act of 1887, 24 Stat. at L. 388, Sec. 6.

the river bed and did not expressly grant any riparian rights, the law of the state of Oklahoma governs in determining what riparian rights, if any, shall attach to the patents in this case.

(*3*) The title to the beds of navigable streams, only, pass to a state by virtue of its admission to statehood, but the right of a state to define and determine riparian rights extends to non-navigable streams as well as to navigable streams.[17] When the United States divests itself of title to the shore lands along non-navigable rivers, the title to the river bed may pass to the state merely by the action of the state in excluding the riparian owners from ownership of the bed,[18] subject only to the superior title of the United States to the beds of such non-navigable streams if it desires to retain ownership thereof.[19]

(*4*) This Court has held many times that, in determining the riparian rights of private claimants, the state law governs in determining what rivers are navigable.[20] and that what is a navigable water under the laws of the states, may be in contra-distinction to the navigable waters of the United States.[21] This Court has further held that since a state may exclude riparian owners from ownership of the beds of non-navigable streams by "expressly denying a riparian title,"[22] the state may do the same thing by the expedient of declaring such streams to be navigable in law, even though they "are not actually so."[23] This Court has, in fact, expressly approved the general practice of the states of reserving control of their non-navigable streams by such procedure.[24]

17. Hardin v. Shedd, 190 U. S. 518; Whitaker v. McBride, 197 U. S. 511, 512.
18. Hardin v. Shedd, 190 U. S. 518.
19. United States v. Oregon, 295 U. S. 2; Oklahoma v. Texas, 258 U. S. 574; United States v. Holt State Bank, 270 U. S. 55; United States v. Utah, 283 U. S. 64.
20. Packer v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Donnelly v. United States, 228 U. S. 243; Wear v. Kansas, 245 U. S. 154.
21. Donnelly v. United States, 228 U. S. 259-262.
22. Brewer-Elliott Oil & Gas Company, 260 U. S. 77.
23. Ibid.
24. Ibid.

The basis of this rule apparently is that since the original states had complete sovereignty, ownership and control, at their election, over the beds of their public waters, whether navigable or not, the new states are entitled to the same prerogative under the doctrine of equality of states.

The petitioners recognize that there is an important exception to this general rule, to-wit, that the states may not invoke a rule of navigability, contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river bed have become vested by *express* grants of the United States.[25] However, this exception does not apply to the case at bar because in this case, as above stated, the United States is not claiming title to the river bed in its sovereign capacity and has not expressly conveyed the river bed or any riparian rights therein to the claimants in the present action.

(*5*) This Court applied the above stated principles in *Wear v. Kansas,* 245 U. S. 154, in which case the Supreme Court of Kansas had taken judicial notice of the navigability of the Kansas river under circumstances identical with those in the case at bar.[26] In that case, as here, the river will not sustain navigation, as has been conceded by the Supreme Court of Kansas.[27] In that case, as here, a Federal patent had been granted to an Indian, *prior to statehood.* In that case, as here, the Territorial legislature had adopted the common law which, if effective, would have extended the title of the patentee to the center of the stream at the time the patent was issued. In that case, furthermore, the Kansas territorial legislature had actually declared the Kansas river to be non-navigable. In spite of this, the Supreme Court of the United States held that the law of the State of Kansas, and not the territorial law, governed the ownership of the river bed, and upheld the state's title thereto.

25. United States v. Oregon, 295 U. S. 2; Brewer Oil and Gas Co., 260 U. S. 77; Oklahoma v. Texas, 258 U. S. 574.

26. State v. Akers, 92 Kan. 169.

27. Hurst v. Dana, 86 Kan. 947.

The Supreme Court of Kansas in 1912 took judicial notice of the navigability of the Arkansas river,[28] which is the same river as is involved in the present action (excepting that in Kansas the river is nearer its source and hence less navigable than in Oklahoma). Ever since that decision the State of Kansas has fully enjoyed the ownership and use of the bed of the Arkansas river on behalf of the whole people of that state. As an incident to such ownership the state has granted numerous oil and gas leases upon the bed of the river, which are similar to the lease involved in the case at bar, and has collected substantial royalties therefrom.[29] Because of the force of the decision of the Supreme Court of the United States in *Wear* v. *Kansas, supra,* (1917) the title of the State of Kansas to the bed of the Arkansas river has never been questioned by the United States, the riparian owners, or by anyone else.[30]

The procedure adopted by the State of Kansas to thus successfully assert title to the bed of the Arkansas river was identical with the procedure employed by the State of Oklahoma in *State* v. *Nolegs.*[31] To the people of Oklahoma it seems unthinkable that under such circumstances, the ownership of the bed of this river could be granted to one state and denied to another.

Upon trial of the present case, the United States District Court for the Northern District of Oklahoma rendered judgment for the state and held, in accordance with *Wear* v. *Kansas,*[32] that inasmuch as the Federal government had not chosen to determine the riparian rights attaching to the patents in question, and since the United States had not chosen to retain title to the river bed, the riparian rights attaching to such patents were governed by state law. The court further held that the state law was

28. Hurst v. Dana, 86 Kan. 947.

29. Findings of Fact No. XI, Record, p. 70. For evidence see Record, pp. 55-61.

30. Ibid.

31. 40 Okl. 479.

32. This case is at times cited by name only to avoid burdensome repetition of citations.

clearly expressed in *State* v. *Nolegs*,[33] to the effect that the Arkansas river was navigable and that the bed was the property of the state.[34]

The United States Circuit Court of Appeals for the Tenth Circuit reversed the judgment of the trial court on the sole ground that the common law, as adopted by the Territory of Oklahoma had the effect of extending the patents to the center of the stream at the time of their issuance.[35]

That court attempted to distinguish the case at bar from *Wear* v. *Kansas* on two grounds, (1) that in *Wear* v. *Kansas* the state court had taken judicial notice of the fact that the river was navigable, whereas in the case at bar the trial court found that the Arkansas river was non-navigable in fact (although the trial court further found that it was bound by the state rule of property that the river was navigable in law); and (2) that the state rule of navigability was not binding upon the Indian allottees in the case at bar because it was not promulgated in a case in which they were parties.

The Circuit Court of Appeals did not mention one of the principal contentions of the State of Oklahoma as set forth in the pleadings[36] and as proved by the evidence,[37] to-wit, that the undeniable and immutable fact remains that the State of Kansas possesses ownership and control of the bed of the Arkansas river, and that to deny the State of Oklahoma the same privilege, under identical circumstances, would violate the constitutional doctrine of equality of states.

It is the earnest contention of the State of Oklahoma that this obvious discrimination between two sovereign states of the Union was brought about by the failure of

33. This case is at times cited by name only to avoid burdensome repetition of citations.

34. The findings of fact and the conclusions of law of the trial court supporting such conclusion, appear at page 74 of the record.

35. Record, pp. 171, 172.

36. Record, pp. 28, 29.

37. Record, pp. 55-63, 159; Findings of Fact XI, Record, p. 70.

the Circuit Court of Appeals to follow the holdings of the Supreme Court of the United States in *Wear* v. *Kansas*[38] and *Erie Railway Company* v. *Tompkins*.[39]

The Circuit Court of Appeals said that the law of the Territory governed the disposition of riparian rights, but the Supreme Court of the United States in *Wear* v. *Kansas*, rejected an identical contention and held that the state law governed such rights.

The Circuit Court of Appeals said, in effect, that the question of navigability was to be determined anew upon the trial of each case that might arise concerning the ownership of the river bed, but the Supreme Court of the United States said, in *Wear* v. *Kansas* that the fact of navigability, "is of a kind that should be established once for all, not perpetually retried."

The Circuit Court of Appeals said that it was not bound by the rule of property promulgated by the Supreme Court of Oklahoma in *State* v. *Nolegs*[40] because the riparian owners in the case at bar were not parties to that case. To the contrary, the Supreme Court of the United States, when construing the rule of *Erie* v. *Tompkins*[41] in *Wichita Royalty Company* v. *City National Bank*,[42] held that where the question is one of state law, the Federal court *must render the same judgment which the state court would have rendered if it were deciding the case.*

Companion cases to the case at bar are now before the Supreme Court of Oklahoma, which clearly show the confusion which would result if the decision of the Circuit Court of Appeals is allowed to stand. Those cases involve the same river bed lease as appears in the present case and are identical with the present action in all respects, excepting only that they involve different riparian lots, which are owned by non-Indians. The District Court of Pawnee Coun-

38. 245 U. S. 154.
39. 304 U. S. 64.
40. 40 Okl. 479.
41. 304 U. S. 64.
42. 306 U. S. 106.

ty, Oklahoma, decided those cases in favor of the state, and made no finding that the Arkansas river is non-navigable in fact, at the location in controversy. On the contrary, the state court rejected a request by the riparian owners for such a finding, and found instead that the river was navigable under the rule of property announced by the Oklahoma Supreme Court in *State* v. *Nolegs.*[43]

The narrow grounds upon which the Circuit Court of Appeals declined to follow *Wear* v. *Kansas* therefore do not exist in the cases in the state court, and it is apparent that even the rule announced by the Circuit Court of Appeals would require a decision for the state in those cases. If the Supreme Court of Oklahoma decides these cases for the state, either on the broad grounds of its own decision in *State* v. *Nolegs,* or upon the narrow grounds contained in the opinion of the Circuit Court of Appeals, the state will retain title to the segments of the river bed involved in those cases, whereas under the decision of the Circuit Court of Appeals, the segments in the river bed involved in the present action will belong to the riparian owners. Thus the title to the bed would depend upon whether the Federal jurisdiction or the state jurisdiction were invoked, which would be the exact opposite of the result which it was the intention of *Erie* v. *Tompkins* to accomplish.

Jurisdiction.

This Court has jurisdiction to review the present action under Section 240 of the Judicial Code, U. S. C., Title 28, Section 347(a).

Federal questions are presented by the conflicting contentions of the parties with reference to the construction of:

(*1*) The constitutional doctrine of equality of states;

(*2*) The decisions of the United States Supreme Court

43. Record, Supreme Court of Oklahoma, Aladdin Petr. Corp., et al., v. State of Oklahoma, et al., No. 32625, pp. 225, 245, 246; L. D. Oldham, et al., v. State of Oklahoma, et al., No. 32629, pp. 246, 266, 267.

in *Wear* v. *Kansas*[44] and *Brewer-Elliott Oil and Gas Company* v. *United States*,[45] and the long line of decisions upon which those cases were based;

(*3*) The various treaties between the United States, and the Cherokee Nation, the Acts of Congress and Executive Orders with reference to the conveyance from the Cherokees to the Otoes and Pawnees, the Proclamation of the President of the United States opening the Cherokee Outlet for settlement, and the Federal patents to the various Indian allottees who are the real plaintiffs in this case, all of which will be detailed fully in the attached brief.

Questions Presented.

The questions presented in this case are:

(*1*) Does a state of the United States have the right to define riparian rights attaching to Federal patents issued prior to statehood, where such patents do not contain any conveyance of the river bed nor any definition of riparian rights?

(*2*) Does a state of the United States have the right to assert title to the bed of a river within its boundaries by a declaration of navigability, even though the river does not meet the Federal test of navigability-in-fact, when the United States has divested itself of title to the shores, is not asserting title to the bed, and has never conveyed the bed to anyone?

(*3*) Since the State of Kansas has been permitted to assert the rights above mentioned with reference to the Arkansas river, as the result of a decision of the United States Supreme Court, can the State of Oklahoma be constitutionally denied the same privilege as to the same river?

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44. 245 U. S. 154.
45. 260 U. S. 77.

Reasons Relied Upon for the Allowance of the Writ.

The petitioners respectfully urge that a writ of certiorari be granted for the following reasons:

(*1*) The question in this case is of profound importance not only to the states of Oklahoma and Kansas, but to all of the western states in which flow rivers of the type of the Arkansas. These rivers, though not actually navigable, carry tremendous volumes of water. They have broad beds, sometimes exceeding a mile in width, which are not adaptable to private ownership but which are most valuable to the public for many purposes including, for example, flood control, hydro-electric power, irrigation and fish and game refuges.

The Supreme Court of the United States has expressly approved the practice of the states in reserving ownership and control over the beds of such rivers by the expedient of declaring them navigable, but the decision of the Circuit Court of Appeals would nullify this wise policy. In so doing, the Circuit Court of Appeals has decided a Federal question in conflict with the decisions of this Court in *Wear* v. *Kansas*,[46] *Brewer-Elliott Oil and Gas Company* v. *United States*[47] and the long line of cases upon which these decisions were based.

(*2*) The specific portion of the river bed here in controversy is extremely valuable to the people of Oklahoma, and is the property of the state under the local law. In declining to follow the rule of *State* v. *Nolegs*, the Circuit Court of Appeals has decided an important question of local law in conflict with a rule of property of the Supreme Court of Oklahoma which has been in effect in this state for more than thirty years.

(*3*) This departure of the Circuit Court of Appeals from the settled doctrines of *Wear* v. *Kansas*, and *Erie* v. *Tompkins* would, if allowed to stand, result in the utmost confusion as to riparian titles along the Arkansas river in

46. 245 U. S. 154.
47. 260 U. S. 77.

both Oklahoma and Kansas and along all similar rivers in other states. In Oklahoma, where certain portions of the Arkansas river bed were expressly conveyed by the United States to Indian tribes prior to statehood, a simple rule of property has prevailed, to-wit, that those portions of the river bed which were thus conveyed to Indian tribes remain the property of the grantees, whereas all other portions of the river bed are the property of the state. In Kansas, where no such conveyance of the river bed to Indian tribes occurred, the state has held undisputed title to the entire bed for many years. In both states, the decision of the Circuit Court of Appeals would upset the established title of the state and would cause every riparian owner along the banks of the river to sue the state to recover title to the bed, and for an accounting for all royalties received by the state. Those riparian owners who came within the jurisdiction of a Federal court and who could obtain a finding by such court that the river was non-navigable in fact, would recover title to the portion of the bed opposite their riparian lots. On the other hand, those riparian owners whose cases remained in the state courts would doubtless be met by the state rule of navigability in law, in which event the state would retain title to the portions of the river bed involved in those cases. The confusion of titles which would thus result springs from the fact that the Circuit Court of Appeals has declined to follow the doctrine of the United States Supreme Court in *Wear* v. *Kansas* in which it said:

> "In this aspect it (the navigability of a river)[48] is a question of state law. * * * The fact is of a kind that should be established once for all, not perpetually retried."

Wherefore your petitioners respectfully ask that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to cer-

48. Language in parentheses supplied.

tify and to forward to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein and that the decree of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Court and your petitioners have such other and further relief in the premises as to this Court may seem just.

MAC Q. WILLIAMSON,
Attorney General of the State of Oklahoma;

J. WALKER FIELD,
Assistant Attorney General of the State of Oklahoma;

WALKER MARLIN,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Attorneys for Champlin Refining Company.

BRIEF IN SUPPORT OF PETITION FOR *CERTIORARI*.

Opinions of Courts Below.

No formal opinion was written by the District Court of the United States for the Northern District of Oklahoma. However the findings of fact and conclusions of law of that court, rendered December 21, 1944, are in opinion form. (Record, p. 65)

The opinion of the Circuit Court of Appeals for the Tenth Circuit was rendered July 29, 1946, 156 F. (2d) 769. Petition for rehearing was denied on August 29, 1946.

Jurisdiction.

The grounds on which the jurisdiction of this Court is invoked appear on page 10 of the petition.

Statement of the Case.

A statement of the case appears on pages 1 to 10 of the petition.

Specification of Errors.

(*1*) The court below erred in holding that the common law as adopted by the Territory of Oklahoma had the effect of extending the patents of the Indian allottees in this case, to the center of the Arkansas river at the time the patents were issued.

(*2*) The court erred in holding that the Oklahoma law of navigability does not govern the riparian rights of the Indian allottees in this case.

(*3*) The court erred in holding that the riparian rights of the Indian allottees in this case are governed by the finding of the trial court that the Arkansas river is non-navigable in fact.

(4) The court erred in holding that the Indian allottees for whom this suit was brought, are the owners of the south half of the Arkansas river at the location in controversy.

(5) The court erred in holding that the State of Oklahoma has no title to the above described portion of the Arkansas river bed.

(6) The court erred in reversing the judgment rendered by the United States District Court for the Northern District of Oklahoma in this case.

Summary of Argument.

A summary of the argument appears at pages 3 to 10 of the petition.

ARGUMENT.

PROPOSITION 1.

The portion of the Arkansas river bed here in controversy was part of the public domain at the time the patents involved in this action were issued and at the time Oklahoma was admitted as a state. Such portion of the bed was never granted to the riparian owners by the United States or by the State of Oklahoma.

To prove this proposition it will be necessary to trace the title of the Arkansas river bed from its first acquisition by the United States from the French Nation as a part of the territory included in the Louisiana Purchase.

In 1828, 1833 and 1835, the United States made treaties with the Cherokee Nation by which it agreed to convey to that tribe a large amount of territory covering what is now the northeastern part of Oklahoma, together with an outlet to the hunting grounds of the Great Plains, which strip covers the entire northern part of Oklahoma and is com-

monly known as the Cherokee Outlet.[1] This territory included the Arkansas river at the location in suit and was formally deeded to the Cherokee Nation in December, 1838, in pursuance of the above described treaties.[2] This conveyance was made to the Cherokees at a time when it was not contemplated that a state would be formed in the Cherokee Nation.[3]

It having become apparent that the Cherokees had been granted more land than they would require, a treaty was made in 1866 between the United States and the Cherokee Nation by which it was agreed that the United States might settle any tribe of friendly Indians upon lands within the Cherokee country, west of the ninety-sixth meridian.[4] As this meridian is the eastern boundary of the Cherokee Outlet, the effect of the treaty was that friendly tribes might be settled anywhere in the Outlet.

Pursuant to the above treaty, Congress by Act of June 5, 1872,[5] authorized the Cherokee Nation to convey to the Osage tribe that portion of the Cherokee Outlet which now comprises Osage County, Oklahoma. This act described the tract conveyed as follows:

> "Bounded on the east by the 97th Meridian, on the south and west by the north line of the Creek country and the *main channel of the Arkansas river,*[6] and on the north by the south line of the State of Kansas."

It was held in *Brewer-Elliott Oil and Gas Company* v. *United States,*[7] that this act, *by its express terms,* extended the conveyance to the center of the river and thus conveyed the north half of the river bed to the Osage tribe.

In September, 1872, the Federal Government's survey of the lands here in question was approved by the Commis-

1. 7 Stats. 311, 7 Stats. 414, and 7 Stats. 478.
2. Def. Ex. 1C, Record, p. 138; introduced, Record, p. 109.
3. See Treaty of 1828 with the Cherokees, 7 Stat. 311.
4. 14 Stats. 799.
5. 17 Stats. 228.
6. Emphasis will be ours unless otherwise noted.
7. 260 U. S. 77.

sioners of the General Land Office and was filed by them as the official government survey of such territory. Copies of the portions of this survey pertaining to the townships which include the river lots here in suit, to-wit, Township 23 North, Range 3 East, (Otoe lands) and Township 23 North, Range 4 East (Pawnee lands) were introduced in evidence[8] and photostatic copies thereof accompany the printed record. These plats show that the bed of the Arkansas river was not surveyed and was not included within any township, section or lot lines, but was meandered as in the case of all rivers in which title to the bed was reserved to the public. None of the government lots along the bank of the river included any portion of the river bed.

It is worthy of note that the Federal government never attempted to sell or convey any portion of the river bed to any Indian tribes after the filing of this survey, having apparently decided that a state would eventually be formed in the Indian territory, and that the bed of the river should be reserved to the public as in the older states.

Thereafter, in 1876, Congress set apart a portion of the Cherokee Outlet, together with a small portion of the Creek territory, as a reservation for the Pawnee tribe, which reservation is a part of the present Pawnee County of the State of Oklahoma.[9] This reservation included Township 23 North of Range 4 East, which is one of the townships in suit. It is important to note that the description of such reservation in the Act of Congress above referred to reads as follows:

> "All that tract of country *between* the Cimarron and Arkansas rivers embraced within the limits of Townships 21, 22, 23, 24 N., Range 4, E. * * *"

The use of the word "between" clearly indicates that neither the Arkansas river nor the Cimarron river was included within the reservation. Furthermore, the government survey above referred to did not include any portion of the

8. Record, p. 96, p. 109.
9. 19 Stats. 28.

river bed within Township 23 of Range 4, but on the contrary stopped the township lines at the river's edge.

On March 3, 1881, Congress authorized the Secretary of the Interior to move the Otoe and Missouria tribes from their then reservations in Kansas and Nebraska,[10] and on June 25, of that year the Secretary of the Interior issued an order setting apart a reservation of 129,113.20 acres for the Otoe and Missourias out of the Cherokee Outlet, which reservation is located in what is now Pawnee County, Oklahoma. Unlike the grant to the Osages, the Otoe reservation did not include any portion of the Arkansas river bed. On the contrary, this reservation included only that portion of the territory which lay on the river bank, as shown by the express language of the Secretary of the Interior's order. As the order is short, we quote it in full, omitting only the townships not involved in this action:

"OTOE RESERVATION.

Department of the Interior,
Washington, June 25, 1881.

Sir: Agreeably to your recommendation of the 13th instant, the following described lands in the Indian Territory, west of the 96°, west longitude, in the tract ceded to the United States by the Cherokees, for the settlement of friendly Indians, by the sixteenth article of their treaty of July 19, 1866, are hereby designated and assigned for the use and occupation of the confederated Otoe and Missouria tribes of Indians, under the provisions of the Act of Congress approved March 3, 1881, (21 Stat., p. 381) namely: • • •

• • • • • • • •

Also that portion of Township 23 North, Range 3 East, lying west of the Arkansas river, containing 14,098.84 acres.

Total acreage, 129,113.20 acres.

10. 21 Stats. 380.

The papers which accompanied your letter before noted are herewith returned.

Very respectfully,

S. J. Kirkwood, Secretary

The Commissioner of Indian Affairs."[11]

It is to be noted that this order used the words, "lying west of the Arkansas river," indicating the clear intention of the Federal government that the bed of the Arkansas river should not be included in the Otoe reservation.

It is to be further noted that the portion of the said township which was set apart for the Otoes was stated in the order to contain 14,098.84 acres. The present county surveyor of Pawnee County has carefully computed the acreage shown on the government survey, using the acreage figures as shown thereon for each lot, section and fractional section contained in the said fractional Township 23 N. of Range 3 E., and has certified that the acreage of the said fractional township, as shown on the government plat, exclusive of the river bed, is 14,099.24 acres.[12] This certificate was corroborated by a similar certificate of Roy G. Collier, civil engineer.[13]

The acreage as shown by these certificates is only 4/10 of an acre different than the acreage as shown in the Secretary's order. This difference is so slight as to be entirely negligible, particularly in consideration of the intricacy of the computation, as shown by the work sheets attached to the affidavits. The fact is evident, therefore, that the Federal government, by order of the Secretary of the Interior set aside a stated number of acres in the said township as a reservation for the Otoes, and the official government survey shows that this stated number of acres comprises only that part of the said township which lies west of the river, *exclusive of the river bed.*

11. Plf. Ex. 5, Record, p. 121; introduced, Record, pp. 89, 109.
12. Def. Ex. 9A, Record, p. 154; introduced, Record, p. 109.
13. Def. Ex. 9, Record, p. 148; introduced, Record, pp. 97, 109.

In 1883 Congress made an appropriation for the purchase from the Cherokees of this new reservation for the Otoes, Missourias, and the other Indian tribes which were settled in the Cherokee country. This Act of Congress[14] provides as follows:

> "That the sum of three hundred thousand dollars is hereby appropriated, to be paid into the Treasury of the Cherokee Nation, out of the funds due under appraisement for Cherokee lands *west of the Arkansas river,* which sum shall be expended as the acts of the Cherokee legislature direct, this amount to be immediately available; Provided, that the Cherokee Nation through its proper authorities shall execute conveyances, satisfactory to the Secretary of the Interior, to the United States, in trust only for the benefit of the Pawnees, Poncas, Nez Perces, Otoes and Missourias and Osages now occupying said tract, *as they respectively occupy the same* before the payment of said sum of money."

It is important to note that this act uses the words "west of the Arkansas river," again clearly indicating the recognition by Congress that the lands of the Otoes and Missourias did not include the bed of the river.

It will also be noted that the statute states that the land granted to the Otoes shall be "as they respectively occupy the same." Previous to the enactment of the statute, the Secretary of the Interior had set apart the Otoe Reservation on the west bank of the river and had defined this reservation by number of acres, as above stated, showing clearly that no part of the reservation was in the bed of the Arkansas river. It is clear therefore, that at the time of the enactment of the Federal statute, the land occupied by the Otoes was the reservation as defined by the Secretary of the Interior, and that the Federal statute, by stating that the grant shall be limited to the land "now occupied" by the

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14. 22 Stats. 624.

Otoes, confirmed the intention that the grant should cover only the reservation on the west shore of the river.

Pursuant to the above described statutes and orders, the Cherokees executed formal conveyances on June 14, 1883, one of which was made to the United States in trust for the Otoes and Missourias[15] and the other to the United States in trust for the Pawnees.[16] These deeds were drawn in almost identical language, each with the other, with the exception only of the property conveyed. They both recite that they are made in pursuance of the Act of Congress of 1883 above referred to,[17] by which, in the language of the deeds, "$300,000 was appropriated 'to be paid into the Treasury of the Cherokee Nation out of funds due unto appraisement for Cherokee lands west of the Arkansas river'."

The deed to the Pawnees then recites that it conveys:

> "The following townships and fractional townships north and east of the Indian meridian, the fractional townships *being on the right bank of the Arkansas river* * * * fractional Townships 23 and 24 North, Range 4 East. * * *"

The deed to the Otoes, in similar language, recites that it conveys:

> "All those certain tracts of land lying and being in the Indian Territory embracing the following township and fractional township north and east of the Indian meridian, *viz.*, * * * fractional Township 23 N. Range 3 E. of the Indian meridian, *lying and being on the right bank of the Arkansas river.* * * *"

The Otoe deed then goes on to recite that the entire reservation covered by the deed contains, in all, 129,113.20 acres, which is exactly the same acreage as stated in the order of Secretary of the Interior above referred to as Defendant's Exhibit 5a.

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15. Plf. Ex. 7, Record, p. 129; introduced, Record, pp. 86, 87, 108, 109.
16. Plf. Ex. 6, Record, p. 122; introduced, Record, pp. 86, 108, 109.
17. 22 Stats. 624.

Both deeds refer to annexed plats marked "A."[18] Each of these plats expressly shows that the Arkansas river is excluded from the territory covered by the deed and that the township lines stop at the edge of the river.

It is apparent from the foregoing statutes, orders and conveyances that neither the Pawnee nor Otoe tribes received title to any portion of the Arkansas river bed but that the bed in its entirety remained the property of the Cherokee Nation, excepting only that portion which had been expressly conveyed to the Osages.

It is important to note that these grants were made to the above described Indian tribes as individuals and not as sovereign nations, since Congress, by the Act of March 3, 1871, (16 Stats. 566) provided "that hereafter no Indian or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." (See preface of second edition of Kappler's Indian Laws and Treaties, Vol. I.) The grants to the Otoes and Pawnees were made long after the above quoted Act of Congress, and hence, were made to these Indians as individual citizens rather than as Indian tribes, in the same manner and with the same effect as though the grants had been made to any other organization of individuals.[19]

Shortly after this the unappropriated lands in the old Oklahoma Territory were opened for settlement, and the

18. Plf. Ex. 6 and 7, Record, pp. 127, 133; introduced, Record, pp. 86, 87, 108, 109.

19. See Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 94. In that case the Court reiterated the general rule that a Federal patent covering a lot on a river bank will not include the river bed unless the state law so provides. The Court then said:

> "The peculiar origin of the title to the 'Half-breed Sac and Fox Reservation,' in the peninsula lying between the rivers Mississippi and Des Moines, did not take it out of the general rule. * * * The grant to the half-breeds was to them as persons and not as a political body. The political jurisdiction remained in the United States. Had the grant been to them as a political society, it would have been a question of boundary between nations or states, and then the line would have been the medium *folum aquae*, as it is now between Iowa and Illinois. * * * The grant was to them as individuals, as tenants in common, and is to be construed as any other grant or sale to individuals'."

success of the famous run of 1889 led to a determination on the part of Congress to acquire the Cherokee Outlet for settlement in like manner. To accomplish this, Congress adopted the policy of purchasing back from the various Indian tribes the territory included in the Outlet, after which the lands in the various reservations were to be allotted to the members of the respective Indian tribes in severalty, and the remainder patented to settlers.[20]

Accordingly, the United States made a treaty with the Pawnee tribe in 1892[21] by which the Pawnees ceded their reservation to the United States, and agreed that the United States should allot the land to each individual member of the tribe in accordance with the General Allotment Act of 1887.[22] This treaty describes the territory thus ceded in exactly the same language as did the previous Act of Congress which had conveyed the property from the Cherokees to the Pawnees,[23] to-wit:

> "All of that tract of country *between the Cimarron and Arkansas rivers* embraced within the limits of townships 21, 22, 23 and 24 North of Range 4 East. * * *"

In 1893 Congress made an appropriation with which to pay the Pawnee tribe for the reservation thus ceded back to the United States. This statute[24] reads in part as follows:

> "That the sum of eighty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the same to be immediately available, to pay the Pawnee tribe of Indians in Oklahoma, formerly a part of the Indian Territory, for all their right, title, claim and interest of every kind and character in

20. Mills, Oklahoma Indian Land Laws, p. 407.

21. Kappler Indian Affairs, Laws and Treaties, Vol. 1, pp. 496-498; Def. Ex. 10, Record, p. 159; introduced, Record, pp. 97, 109.

22. 24 Stats. 389.

23. 19 Stats. 28.

24. 27 Stats. 568, Sec. 12.

and to all that tract of country *between the Cimarron and Arkansas rivers* embraced within the limits of seventeen specified townships of land, ceded, conveyed, and relinquished to the United States by said Pawnee tribes of Indians, by article one of an agreement concluded on the twenty-third day of November, eighteen hundred and ninety-two between David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, and said Pawnee tribe of Indians. * * *"

The use of the word "between" again indicates the recognition by Congress that the Pawnee tribe had never owned any portion of the Arkansas river bed. It is also clear from the foregoing that the Pawnees relinquished to the United States every vestige of title which they had ever owned in any and all lands which they had acquired in Oklahoma. However, such relinquishment does not affect the title to the river bed as the Pawnees never held title to the bed.

No treaty was made with the Otoe and Missouria tribes, their lands being allotted to the individual members of the tribe by authority of the General Allotment Act of 1887[25]. However, as the Otoes had never acquired the bed of the Arkansas river, it was not necessary that they should relinquish any title thereto.

On December 19, 1891, a treaty was made with the Cherokees by which they ceded to the United States all of their remaining right, title and interest in and to the Cherokee Outlet including the bed of the Arkansas river.[26] The all-inclusive nature of this cession is shown by the first article of the treaty which reads as follows:

"The Cherokee Nation by act duly passed shall cede and relinquish all its title, claim, and interests of every kind and character in and to that part of the

25. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.

26. Kappler, Indian Affairs, Laws and Treaties, Vol. 1, pp. 490-492; Def. Ex. 12, Record, p. 159; introduced, Record, pp. 98, 109.

Indian Territory bounded on the west by the State of Kansas; on the east by the ninety-sixth (96°) degree of west longitude, and on the south of the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe Reservation, created or defined by Executive Order dated August 10, 1869. The tract of land embraced within the above boundaries containing eight million, one hundred and forty-four thousand, six hundred and eighty-two and ninety-one one hundredths (8,144,682.91) acres more or less."

The above description constitutes the Cherokee Outlet and includes the Arkansas river at the location in suit.

In 1893, Congress approved the above described treaty and made an appropriation to pay the Cherokees for the territory thus ceded.[27] This Act of Congress reads in part as follows:

"That the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars payable as hereinafter provided is hereby appropriated out of any money in the Treasury not otherwise appropriated, and the Secretary of the Interior is hereby authorized and directed to contract to pay eight million, three hundred thousand dollars, or so much thereof as may be necessary in addition, to pay the Cherokee Nation of Indians for all the right, title and interest and claims which the said nation of Indians may have in and to certain lands described and specified in an agreement concluded between Davis H. Jerome, Alfred M. Wilson and Warren G. Sayre, duly appointed commissioners on the part of the Cherokee Nation of Indians in the Indian Territory, on the nineteenth day of December, eighteen hundred and ninety-one, bounded on the west by the one-hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of the west longitude, and on the south by the Creek Nation, the Territory of Okla-

27. 27 Stats. 557, Sec. 10.

homa and the Cheyenne and Arapahoe Reservation, created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine; * * *"

The comprehensive terms of the treaty and the Act of Congress which ratified it, leave no doubt that the Cherokees relinquished to the United States all interest of every kind and character, which they may have had in the territory contained in the Cherokee Outlet. As noted above, the Cherokees had retained title to the bed of the Arkansas river throughout its entire course in the Cherokee Outlet, excepting only the portion expressly conveyed to the Osage tribe. It is clear, therefore, that by the terms of the cession by the Cherokees above noted the entire bed of the Arkansas river of the Cherokee Outlet, excepting the portion conveyed to the Osage tribe, became the property of the United States as part of the public domain.

This was expressly confirmed by the Presidental proclamation of August 18, 1893,* by which the Cherokee Outlet was opened for settlement.

The Proclamation first recites that the Cherokee Nation had previously:

"Ceded, conveyed, transferred, relinquished and surrendered all of its title, claim and interest of every kind and character * * *"

in and to the Cherokee Outlet. The Proclamation then declares that all of the lands thus acquired from the Cherokees and Pawnees (together with the other lands making up the Cherokee Outlet) would be open for settlement, saving and excepting only the lands in the Osage and Otoe reservation.

The pertinent parts of the Proclamation are quoted as follows:

"Now, therefore, I, GROVER CLEVELAND, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other laws of the United States, and by said several

*28 Stats. 1222.

agreements, do hereby declare and make known that *all the lands acquired from the Cherokee Nation of Indians,* the Tonkawa tribe of Indians, *and the Pawnee tribe of Indians,* by the three several agreements aforesaid will at the hour of twelve o'clock noon (Central Standard Time) on Saturday the sixteenth day of the month of September, A. D., eighteen hundred and ninety-three, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this Proclamation, *saving and excepting* lands described and identified as follows, to-wit: The lands set apart for the Osage and Kansas Indians, being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and *the main channel of the Arkansas River;* the lands set apart for the confederated Otoe and Missouria tribes of Indians, described as follows, to-wit: Township Twenty-two North, Range One East; Township Twenty-three North, Range One East; Township Twenty-two North, Range Two East; Township Twenty-three North, Range Two East; Township Twenty-two North, Range Three East; and that portion of Township Twenty-three North, Range Three East, *lying west of the Arkansas river;* * * *" (and other lands not involved in this case).

It is highly significant that the President took pains in his proclamation to state that the Osage reservation was bounded "by the main channel of the Arkansas river," and to further state that, on the contrary, the Otoe reservation was comprised of lands *"lying west of the Arkansas river."*

On this account, it is clear that the south half of the Arkansas river bed, adjoining the Otoe reservation, was

declared to be a part of the public domain, because in the proclamation the Otoe reservation was declared to be confined to lands "lying west of the Arkansas river." It is equally clear that the north half of the Arkansas river bed within the Osage reservation was declared not to be a part of the public domain, because, in the proclamation, the Osage reservation was declared to extend to "the main channel of the Arkansas river."

After the Cherokee Outlet had been opened for settlement, the Federal government proceeded to distribute the lands in the Pawnee and Otoe reservations to the members of those tribes in severalty, under authority of the General Allotment Act of 1887.[28]

Accordingly, the government issued the trust patents which are involved in the case at bar as follows:

PAWNEES.

On October 9, 1893, to William Bayhylle, covering Lot 6, of Section 17, Township 23 North, Range 4 East (together with other lands);[29]

On October 9, 1893, to Horace Field, covering Lots 1, 2 and 3 of Section 19, Township 23 North, Range 4 East (together with other lands);[30]

OTOES.

On November 24, 1906, to Ethel Lewis Barnes, covering Lot 5, of Section 24, Township 23 North, Range 3 East (together with other lands);[31]

On June 10, 1907, to Anna Robedeaux, covering Lot 6 of Section 24, Township 23 North, Range 3 East (together with other lands).[32]

It is significant, that none of these patents conveyed

28. Mills, Oklahoma Indian Land Laws, p. 407; 24 Stats. 389.
29. Plf. Ex. A, Record, p. 114; introduced, Record, pp. 85, 108, 109.
30. Plf. Ex. 2, Record, p. 116; introduced, Record, pp. 85, 108, 109.
31. Plf. Ex. 3, Record, p. 118; introduced, Record, pp. 85, 108, 109.
32. Plf. Ex. 4, Record, p. 119; introduced, Record, pp. 85, 108, 109.

any portion of the river bed. All of the patents described the lands by lot numbers, and a reference to the official government survey[33] shows that the said lots were confined to the bank of the river and did not cover or include any portion of the bed.

The State of Oklahoma therefore is not seeking in this action to take the title of the river bed away from the riparian owners, inasmuch as the riparian owners have never received any title to the bed. The state has merely declined to extend the titles of the riparian owners to center of the river.

PROPOSITION 2.

Since the Federal patents in the case at bar did not expressly convey the river bed and did not expressly grant any riparian rights, the law of the State of Oklahoma governs in determining whether or not the title of the riparian owners extends to the center of the Arkansas river, for

(1) *The State law determines the extent of the riparian rights, which attach as an incident to Federal patents in all cases in which the patent does not define said rights.*

This rule has been upheld in a long line of decisions of the Supreme Court of the United States, from which we quote:

Brewer-Elliott Oil and Gas Company v. *United States*, 260 U. S. 89:

> "In government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

Hardin v. *Jordan*, 140 U. S. 402:

> "Beyond all dispute, the settled law of this court, established by repeated decisions, is that the question how far the title of a riparian owner extends is one of

33. Def. Ex. 7 and 8; introduced, Record, pp. 96, 109 (Plats accompany Record.)

local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority."

Kaukauna Water Power Co. v. *Green Bay & Miss. Canal Co.*, 142 U. S. 271:

"It is the settled law of Wisconsin, announced in repeated decisions of its Supreme Court, that the ownership of riparian proprietors extends to the center or thread of the stream, subject, if such stream be navigable, to the right of the public to its use as a public highway for the passage of vessels. * * * With respect to such rights we have held that the law of the state as declared by its Supreme Court, is controlling as a rule of property."

Shively v. *Bowlby*, 152 U. S. 57:

"By the law of the State of Oregon, therefore, as enacted by its legislature and declared by its highest court, the title in the lands in controversy is in the defendants in error; and, upon the principles recognized and affirmed by a uniform series of recent decisions of this court, above referred to, *the law of Oregon governs the case.*"

St. Anthony Falls Water Power Company v. *Board of Water Commissioners*, 168 U. S. 366:

"The jurisdiction of the state over this question of riparian ownership has been always, and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiff's riparian right of property was therefore the subject of adjudication by the state court, and the rule has been definitely stated by that court in its judgment, which is now under review."

(2) *The above stated rule applies to non-navigable streams as well as to navigable streams.*

Hardin v. *Shedd*, 190 U. S. 519:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument *that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.*"

(3) *The same rule applies to Federal patents to Indians and Indian tribes.*

Oklahoma v. *Texas*, 258 U. S. 594:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance should be construed and given effect in this particular according to the law of the State in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*"

The above language was quoted with approval in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77.

The Court has affirmed this rule in the very recent case of *United States* v. *Oklahoma Gas & Electric Co.*, 318 U. S. 209-210, in which the Court held that the rights of the public to a highway easement on the lands of Indian allottees adjoining a state highway are to be determined by the laws of Oklahoma, and said:

> "It is well settled that a conveyance by the United States of land which it owns beneficially, or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies."

Supporting this conclusion the court said further at p. 211:

> "The interpretation suggested by the government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State, and then only by permission of the Secretary, subject to compliance with 'such requirements as he may deem necessary.'
>
> "Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear."

These words are significantly applicable to the case at bar, for in the present case the State of Oklahoma is subjecting the Indians "only to the same rule of law as are others in the State." Furthermore, the shore of the Arkansas river is "spotted with restricted lands held in trust for Indian allottees" and "complication and confusion would follow from applying to * * * such lands rules differing from those which obtain as to lands of non-Indians."

The rule announced in the above quoted case finds support in the Federal statutes. The General Allotment Act of 1887, under which the Pawnee and Otoe lands involved in the case at bar were distributed, reads in part as follows:

> "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or territory in which they may reside." (24 Stat. at L. 389, Section 6.)

The Supreme Court in *Re Heff*, 197 U. S. 503, declared that under such act the Indians became subject to the State laws immediately upon issuance of the trust patent and that the application of the State laws does not have to wait until the issuance of the second patent. The Court said

> "So far as his political status is concerned, the allottee is declared to be a citizen—not that he will be a citizen after twenty-five years have passed and a second patent shall have been issued."

PROPOSITION 3.

The adoption by the Supreme Court of Oklahoma of the rule of property that the Arkansas river is navigable and that its bed belongs to the State[34] had the effect of excluding the riparian owners from ownership of the bed and thereby appropriating title to the State, for,

(1) *The State law governs in determining what shall be deemed a navigable water within the meaning of the local rules of property.*

Donnelly v. *United States*, 228 U. S. 262:

> "But it results from the principles already referred to that what shall be deemed a navigable water within the meaning of the local rules of property is for the determination of the several States."

34. State v. Nolegs, 40 Okl. 479.

Hardin v. Jordan, 140 U. S. 382:

"This right of the States to regulate and control the shores of tide waters and the land under them is the same as that which is exercised by the Crown in England. In this country the same rule has been extended to our great navigable lakes which are treated as inland seas; and also, in some of the States, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and, in Pennsylvania, to all the permanent rivers of the State; but it depends on the law of each state *to what waters* and to what extent this prerogative of the state over the lands under water shall be exercised."

Packer v. *Bird,* 137 U. S. 669:

"* * * In this case *we accept the view of the Supreme Court of California* in its opinion as expressing the law of that State, '*that the Sacramento river being navigable in fact,* the title of the plaintiff extends no farther than the edge of the stream'."

(2) *The State rule of navigability may be opposite to the Federal rule.*

Donnelly v. *United States,* 228 U. S. 262:

"The question of the navigability in fact of nontidal streams is sometimes a doubtful one. It has been held in effect that what are navigable waters of the United States, within the meaning of the Act of Congress, *in contradistinction to the navigable waters of the states,* depends upon whether the stream in its ordinary condition affords a channel for useful commerce."

(3) ***When the United States divests itself of title to the shore lands along non-navigable rivers, title to the river bed may pass to the State merely by the action of the State in excluding riparian owners from ownership of the bed, provided only that the United States does not elect to retain its superior title.***

Hardin v. *Shedd*, 190 U. S. 519, 520:

"When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. *Nevertheless, it has become established almost without argument that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies.* In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned. (Citing cases.)"

* * * * * * * *

"The law of Illinois has been settled since *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and it now is clear, by the decision in this case and later that conveyances of the upland do not carry adjoining land below the water line. (Citing cases.) Following these decisions, we must hold that the title set up by the plaintiffs in error, Hardin, fails."

Thus Hardin, who claimed under United States patent, was held to have no title to the bed, and Shedd was awarded title as grantee of the State of Illinois.

In its opinion in the case of *Hardin* v. *Jordan*, 140 U. S. 393, referred to in the above quotation, this Court

recognized that the original states had appropriated title to the beds of their public waters, regardless of navigability. The Court said:

> "These ordinances seem to have been the foundation of a local common law in Massachusetts (including Maine) which has led to a course of decisions with regard to the title of lakes and ponds at variance with the common law, and which have been followed in New Hampshire and some other states. It is there held that the land under water in such lakes and ponds belongs to the state, and not to the riparian owners; and that when land is conveyed bounding upon a natural lake or pond, the grant extends only to the water's edge."

It is apparent that under the doctrine of equality of states, the new states have the same right to appropriate the beds of their public waters as did the original states.

(4) *Since a state may exclude riparian owners from title to the beds of non-navigable streams by expressly denying a riparian title, the state may do the same thing by the expedient of declaring such streams to be navigable in law, thereby appropriating title to the beds.*

Brewer-Elliott Oil and Gas Company v. *United States,* 260 U. S. 77:

> "Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control. No one can object to it unless it is sought thereby to conclude one whose right to the bed of the river *granted* and vesting before statehood, depends for its validity on non-navigability of the stream in fact.
>
> "In *Wear* v. *Kansas,* 245 U. S. 154, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood,

to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunals took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. *The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same.*" (Italics ours.)

(5) *Although there is an exception to this general rule, to-wit, that the states may not invoke a rule of navigability contrary to the fact, against the United States itself or against grantees of the United States whose rights to the river beds have become vested by express grants, this exception does not apply to the case at bar because in this case the United States is not claiming title to the river bed in its sovereign capacity* and it has not expressly conveyed the river bed or any riparian rights therein to any claimants in the present action.*

Examples of this exception to the general rule are found in the following cases.

In *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, this Court awarded the north half of the Arkansas river to the Osage tribe because the United States had *expressly* conveyed such portion of the river bed to the Osages prior to Oklahoma Statehood. The Court said at page 87:

> "If the Arkansas river is not navigable, then the title of the Osages as granted certainly included the bed of the river as far as the main channel *because the*

*Complaint, Record, pp. 11-13; Stipulation, Record, p. 38; Conclusions of Law, Record, p. 72.

words of the grant expressly carry the title to that line." (Italics ours.)

The Court applied the Federal rule of navigability—in fact in that case because it was construing an *express* grant of the river bed. However, there is no express grant of the river bed involved in the case at bar, nor is there any implication whatsoever of federal governmental intent to convey more land than was actually described in the various conveyances of the shore lands. Hence, under the long line of decisions quoted under Proposition 1 of this brief, the state law of navigability, and not the Federal law, governs the riparian rights of the Indian allottees in the present case. The Court recognized the general rule by stating later in the opinion at page 88:

> "It is true that where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the Public Land Laws may be determined according to local rules."
>
> • • • • • • • •
>
> "In government patents containing no words showing purpose to define riparian rights the intention to abide the state law is inferred."

And then quoted from *Hardin* v. *Jordan*, 140 U. S. 384:

> "In our judgment, the grants of the government for lands, bounded on streams and other waters without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

In *United States* v. *Oregon*, 295 U. S. 6, the Court held, that a state could not invoke its rule of navigability contrary to the fact so as to deprive the United States (in its sovereign capacity) of its superior title. The Court, however, recognized that the state law is supreme in defining the riparian titles of private claimants for it said later in the opinion in that case at page 28:

"The construction of grants by the United States is a Federal, not a state question (citing cases), and involves the consideration of state questions only in so far *as it may be determined as a matter of Federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances* (citing cases). In construing a conveyance by the United States of land within a state, *the settled and reasonable rule of construction of the state affords an obvious guide in determining what impliedly passes to the grantee as an incident to land expressly granted.*" (Italics ours.)

The state law regarding the riparian rights which attach to Federal patents, therefore becomes the Federal law by assent of the United States.

In *Oklahoma* v. *Texas,* 258 U. S. 574, this Court declined to follow the Oklahoma rule of navigability contrary to the fact, because in that case the United States had made an *express* grant of the north half of the Red river bed to Indian tribes prior to statehood, and had retained title (in its sovereign capacity) to the south half of the river bed. However, this Court again recognized the general rule that state laws govern the riparian rights of private claimants who have received no express grant to the river bed, in the following language found at page 594, which we repeat for emphasis:

"Where the United States owns the bed of a non-navigable stream and the upland on one or both sides, it, of course, is free, when disposing of the upland, to retain all or any part of the river bed; and whether, in any particular instance, it has done so, is essentially a question of what it intended. If by a treaty or statute or the terms of its patent it has shown that it intended to restrict the conveyance to the upland, or to that and a part only of the river bed, that intention will be controlling; and, if its intention be not otherwise shown, it will be taken to have assented that its conveyance

should be construed and given effect in this particular according to the law of the state in which the land lies. *Where it is disposing of tribal land of Indians under its guardianship, the same rules apply.*" (Italics ours.)

PROPOSITION 4.

The Oklahoma rule of property with reference to the bed of the Arkansas river is clear and unequivocable.

The Oklahoma Supreme Court said in *State* v. *Nolegs*, 40 Okl. 479:

> "The above cases of *Dana* v. *Hurst, supra,* and *United States* v. *Mackey, supra,* both being exhaustive and well-considered opinions, the same are approved by this Court, and we hold that the Arkansas River is a navigable stream in its entire course through the State of Oklahoma, and that the title of the bed thereof, to the high-water mark, is in the state. * * *"

The State of Oklahoma has reinforced the decision in *State* v. *Nolegs* by a statute, Title 64, O. S. 1941, Section 290, which reads as follows:

> "The Commissioners of the Land Office are hereby authorized to lease for oil and gas purposes all lands between mean high water mark in all streams or rivers of two chains or over; all such streams are declared the property of the State of Oklahoma." (Laws 1919, Chapter 206, page 293, Section 1.)

The Supreme Court of Oklahoma has given effect to this statute in two recent cases, *City of Tulsa* v. *Commissioners of Land Office*, 101 P. (2d) 246, and *City of Tulsa* v. *Peacock*, 74 P. (2d) 359. Both of these cases involved the title of the Arkansas river bed, and in both cases the Supreme Court of Oklahoma assumed that the title to the river bed belonged to the State of Oklahoma.

PROPOSITION 5.

This Court applied the above stated principles in *Wear* v. *Kansas*, 245 U. S. 154, and in that case upheld the title of the State of Kansas to the bed of the Kansas river under circumstances identical with those in the case at bar. Under the authority of the rule of that case, the State of Kansas has also successfully asserted title to the bed of the Arkansas river, the same river which the State of Oklahoma is claiming in the present action.

The case of *Wear* v. *Kansas* concerned the title to the bed of the Kansas river which is a smaller river than the Arkansas and is admittedly non-navigable in fact.[35]

The State of Kansas had passed a statute regulating the sale of sand from the beds of the navigable rivers of the state and providing for the payment to the state of royalties for all sand thus sold. The action in question was brought by the state against the State Treasurer and certain riparian owners to test the constitutionality of the statute. The riparian owners claimed that the Kansas river was not navigable in fact and that they, the riparian owners, owned the bed and that the State of Kansas had no title to the bed or to the royalties therefrom.

The state court refused to hear evidence, took judicial notice of the navigability of the stream, and held that the state owned the bed to the exclusion of the riparian proprietors for the reason, in the language of the court:

> "That Kansas entered the Union upon an equal footing with the other states; that upon her admission into the Union absolute property in and dominion and sovereignty over the soils under the navigable *and*

35. See Hurst v. Dana, 86 Kan. 947, in which the Kansas Supreme Court said:

> "For a generation or more land transportation has so far superseded the use of water craft in this region that even the Missouri, a stream known to be navigable in fact and in law, has ceased to float upon its waters along the boundary of this state any appreciable commerce of the country, *and the Kansas, which we have judicially noticed as navigable* (Wood v. Fowler, 26 Kan. 682, 40 Am. Rep. 330), *floats none at all.*"

public streams within its limits passed to the state, in trust for all the people, subject to the superior rights of the Federal government with respect to navigation."[36]

The Supreme Court of the United States in *Wear* v. *Kansas, supra,* affirmed the state court in all respects.

In its opinion the Supreme Court first considered the contention that the river was non-navigable under the common law (which had been adopted by the territorial legislature) and in the following language expressly denied that the patents carried to the center of the stream under such theory:

> "The argument of the plaintiffs in error does not need a lengthy response or a statement of all the answers that might be made to it. *It was said that the territorial statute gave to the patent of the United States the effect of a great ad filum aquae. But this attributes too detailed and precise an effect to a general provision of law."* (Italics ours.)

The court went on to say that since the Supreme Court of Kansas had, after statehood, renounced the English test of navigability, the state rule is the governing law and no riparian rights could have been acquired under the territorial law in excess of those later granted by state law. The court said:

> "We should be slow to believe that a state beginning its organized life with an express adoption of the common law of England stood any differently from one where the common law was assumed to prevail because the citizens were of English descent. Therefore, when the Supreme Court of Kansas regards the principle of the common law to be that the fact of navigability, not the specific test of navigability convenient for England, is what excludes riparian ownership of river beds, it is

36. The case in the state court was entitled State v. Akers, 92 Kan. 169.

impossible for us to say that the territorial statute even purports to give greater rights."

The riparian owners then contended that if navigability in fact were to be considered the test in Kansas, then the riparian owners were entitled to a jury trial, so as to determine by the evidence whether the Kansas river was navigable in fact.

The Supreme Court also overruled this contention and stated that even though navigability in fact be the test, the Supreme Court of Kansas was entitled to take judicial notice of the navigability of the river. The following portion of the opinion, written in the expressive language of Justice HOLMES, seems to contain the gist of the decision:

> "Then it was said, if navigability in fact is the test, the plaintiffs in error were entitled to go to a jury on that fact as it was in 1860, the date of the original grant, and the Supreme Court of the state was not entitled to take judicial notice that the river was navigable at Topeka. But there is no constitutional right to trial by jury in such a case, and if a state court takes upon itself to know without evidence whether the principal river of the state is navigable at the capital of the state, we certainly cannot pronounce it error. *In this aspect it is a question of state law.* (Citing cases.) *The fact is of a kind that should be established once for all, not perpetually re-tried.*" (Italics ours.)

The similarity between the above case and the present case is marked. There, the riparian owner derived title from an Indian patent issued prior to statehood. Here, the riparian owners have also derived title from Indian patents, which were also issued prior to statehood. There the common law was in effect in Kansas territory[37] the same as in the Territory of Oklahoma. There, as here, the river would not sustain actual navigation[38] although in that case

37. So held by Supreme Court of Kansas in State v. Akers, 92 Kan. 169.
38. Hurst v. Dana, 86 Kan. 947.

the additional circumstance was present, that in Kansas the Territorial legislature had actually declared the river to be non-navigable.[39] There the State of Kansas was claiming that in spite of such territorial law, the state had the sovereign right to declare the river to be navigable and thus exclude the riparian owners from title to the bed. Here, the State of Oklahoma is making the same claim. There the State of Kansas was claiming right to the sand in the river bed, and here the State of Oklahoma is making a like claim as to oil. There, the Supreme Court of Kansas established the title of the state to the river bed by taking judicial notice of the fact that the river is navigable. Here, the State of Oklahoma has established title to the river bed by the same procedure.

The decision in *Wear* v. *Kansas* was expressly affirmed in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, in which the Court said at page 89:

> "In *Wear* v. *Kansas*, 245 U. S. 154, 72 L. ed. 214, 38 Sup. Ct. Rep. 55, Ann. Cas. 1918B, 586, upon which the appellants rely, the patent of the United States under which Wear derived title was a grant, made before statehood, to land bordering on the Kansas river, without restriction, reservation, or expansion. The state tribunal took judicial notice of the navigability of the river, refused to hear evidence thereon, and held that the patent to land on the navigable stream did not convey the bed of the river. The United States, by its unrestricted patent, was properly taken to have assented to its construction according to local law. Whether the local law worked its purpose by conclusively determining the navigability of the stream, without regard to the fact, or by expressly denying a riparian title to the bed of a non-navigable stream, was immaterial. In either view the result there would have been the same."

By the same process, the State of Kansas has also asserted title to the bed of the Arkansas river in *Hurst* v.

39. See opinion in Wear v. Kansas, 245 U. S. 154.

Dana, 86 Kan. 947, and because of the force of the decision of the Supreme Court of the United States in *Wear* v. *Kansas, supra*, the title of the state to the bed of the Arkansas river has never since been questioned.

The Oklahoma rule of property expressed in *State* v. *Nolegs*, 40 Okl. 479, is identical with that by which the State of Kansas acquired title to the same river, and was promulgated only two years after the Kansas decision. The Oklahoma Supreme Court, in fact, based its decision in *State* v. *Nolegs* upon the decision of the Kansas court in *Hurst* v. *Dana*.

Since the procedure adopted by the State of Kansas to successfully assert title to the Arkansas river was based upon Constitutional principles approved by this Court, we most earnestly plead that to deny the State of Oklahoma the ownership of the bed of the same river under identical procedure and circumstances, would violate the constitutional doctrine of equality of states, and would be so inequitable as to offend every principle of natural justice.

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